APPENDIX

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 13, October Term, 1955.

(Argued October 11, 12, 1955

Decided December 2, 1955.)

Docket No. 23560

NORVIN RIESER, MILTON S. KOBLITZ, GEORGE S. CHAMPLIN, E. M. DART MFG. CO., LILLIAN BOEHM, BERNARD FEIN, KATHRYN P. BRAITHWAITE and EDWARD F. QUIRKE,
Plaintiffs-Appellants,

—and—

EMANUEL JOSEPHSON, RUBIN SLAVSKY, RAYMOND WILEY and WILLIAM W. LANGE,
Intervening Plaintiffs-Appellants,

—v.—

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Defendant-Appellee.

Before:

FRANK, HINCKS and WATERMAN,
Circuit Judges.

Appeal from a summary judgment of the United States District Court for the Southern District of New York, entered by Judge Murphy. Affirmed.

LOUIS BOEHM AND NATHAN B. KOGAN (Victor Louse, Abraham K. Weber and Spencer Pinkham, of counsel) *for appellants.*

ABRAHAM K. WEBER *for Kathryn P. Braithwaite and Edward F. Quirke.*

LOUIS H. O. FISCHMAN *for intervening appellants.*

CRAVATH, SWAINE & MOORE (Ralph L. McAfee, George M. Billings and Edward C. Perkins, of counsel) *for appellee.*

FRANK, *Circuit Judge*:

The facts are fully stated in Judge Murphy's opinion, 123 F. Supp. 44.

1. In their brief filed in this court, plaintiffs say that their suit is but "an old-fashioned creditors' bill" by "creditors of a corporate principal debtor against its sole stockholder for violation of its fiduciary duties as such stockholder," and that this suit, substantively, rests on no New York statute. Since, then, the basis of the plaintiffs' suit is non-statutory, we need not consider two cases, much discussed by the parties, *Buttles* v. *Smith,* 281 N. Y. 226, and *Hastings* v. *Byllesby,* 293 N. Y. 404, as both those cases involved the application of the New York statute of limitations to claims based, substantively, on one or more New York statutes.[1]

2. A judgment-creditor, with execution returned unsatisfied, may, without relying on a statute, by an "old-fashioned" creditors' bill, have an equitable levy on an

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[1] Assuming, *arguendo,* that the *Byllesby* and *Buttles* cases were applicable, we think that the instant case is analogous to *Byllesby* rather than *Buttles,* and that the plaintiffs would therefore be barred under the rationale of the *Byllesby* case.

available asset of his debtor. The asset may consist of a claim against a third person for a wrong that person did to the debtor. If that wrong be regarded as also done to the creditor, it is only an indirect wrong, and the creditor's suit is derivative, in effect.

However, plaintiffs contend that they suffered a direct and independent injury, apart from that done to Alton, and that a cause of action based on such injury accrued only after they had obtained a judgment with execution thereon returned unsatisfied.[1a] The crucial question here is whether the alleged acts of B & O (a) constitute harms to Alton, and but indirectly to plaintiffs, Alton's bondholders, and/or (b) constitute harms done directly to those bondholders. Absent a statute, we think they clearly came within the first category.

Alton, for these harms, could have held B & O liable; and so could Alton's bankruptcy trustee, as Alton's successor.[1b] Like the trustee, the plaintiffs stand in Alton's shoes; they have no shoes of their own. Significantly, plaintiffs cite no case holding otherwise, absent a statute.

True, while it remained under the domination of B & O, its sole stockholder, Alton, in practical terms, as virtually B & O's slave, could not have brought suit against B & O. But, under the New York statute of limitations as construed by the New York courts, the period of that domination did not suspend the running of the statute. See *Aus-*

[1a] We assume, *arguendo*, that conceivably there might be facts (other than those here) giving rise to such an independent cause of action, even in the absence of a statute, which the creditors could not pursue until they obtained a judgment and execution thereon was returned unsatisfied.

[1b] Cf. *Henderson* v. *Binkley Coal Co.*, 74 F. (2d) 567 (C. A. 2); *Austrian* v. *Williams*, 198 F. (2d) 697 (C. A. 2).

trian v. *Williams,* 198 F. (2d) 697 (C. A. 2); *Laird* v. *United Shipyards,* 163 F. (2d) 12 (C. A. 2).[2]

3. Since plaintiffs do not allege any fraudulent conveyance, the New York Debtor and Creditor Law—which dispenses with a judgment in such circumstances—does not apply. Therefore a suit of this kind, an old-fashioned creditor's suit, could not be maintained until plaintiffs had the equivalent of a judgment against Alton and an unsatisfied execution. Plaintiffs maintain, and we shall assume, that they first occupied that position on May 31, 1947, when the Alton bankruptcy proceedings terminated.[3] The statute of limitations, Section 53 of the New York Civil Practice Act, applicable to such an equitable action, fixes a ten-year period within which suit must be brought; and this suit began on May 7, 1952, within that ten-year period.

These facts, however, do not help plaintiffs. We shall assume that, within the ten years ending May 31, 1957, plaintiffs, by their suit, could levy an equitable execution on any of Alton's available assets, which the final decree in the Alton bankruptcy proceedings permitted plaintiffs to pursue. But, to succeed, plaintiffs must show that those assets on which they seek thus to levy—*i.e.,* Alton's claims against B & O—were available when the suit began in 1952. They were not then available, because, before 1952, the statute of limitations had run with respect to those claims.[4] For the pertinent period of limitations is either

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[2] This interpretation, out of line with the interpretation of similar statutes in many other jurisdictions, seems harsh and inequitable. But, of course, we must abide by what the New York courts say its statutes mean.

[3] That is, they obtained the equivalent of a judgment on the allowance of their bondholder claims in the Alton bankruptcy proceedings; and the termination of those proceedings on May 31, 1947, with part of the amounts due thereon unpaid, was the equivalent of a return of execution unsatisfied.

[4] Our reasoning here differs from that of the district judge. But, in affirming a judgment, of course we may do so for reasons other than those of the court below.

(a) three years, under the New York Civil Practice Act, Section 49 subdivision 7,[5] or (b) six years, under Section 48 subdivisions (1) or (8).[6]

In short, making assumptions most generous to plaintiffs, suit on the claims against B. & O. were barred on November 25, 1948, *i. e.*, six years from the appointment of Alton's bankruptcy trustee on November 25, 1942.

4. To be sure, the trustee was discharged on May 31, 1947. We shall assume that—thanks to the provision of the final decree in the Alton bankruptcy proceedings which gave the bondholders the right to pursue the claims, if any, against B. & O.—plaintiffs succeeded to Alton's right to sue B. & O. which had never been availed of by Alton's trustee. If so, on the most generous assumptions, plaintiffs' suit would not have been barred until November 25, 1948. But plaintiffs did not start suit until 1952.

We cannot accept plaintiffs' contention that the statute commences to run anew when a claim passes to an assignee of, or a successor to, one who could have sued thereon. An assignment, whether or not by "operation of law," has no such resurrective or phoenix-like potency.[7] Nor, since

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[5] Section 49 subdivision 7 includes "an action to recover damages for an injury to property. * * *"

[6] Section 48 subdivision 1 includes an action upon a contract, express or implied, except a judgment and other exceptions not here relevant.

Section 48 subdivision 8 includes derivative actions against present and former directors, officers and stockholders for an accounting, for fraud, or to recover penalties or forfeitures imposed by statute or common law, but specifically excludes actions for waste or injury to property or for an accounting in connection therewith. For these latter actions, reference is made to Section 49 subdivision 7.

[7] *Bucklin* v. *Bucklin*, 1 Abb. Ct. App. Dec. 242, 251; *Cooley* v. *Lobdell*, 153 N. Y. 596, 602-603.

Section 14 of the New York Civil Practice Act makes a specific exception of an action by a principal against his agent, an exception not relevant here.

Alton's trustee in bankruptcy could have asserted these claims, did the pendency of the bankruptcy proceedings toll the statute, since 11 U. S. C. Section 205(b)—which provides that "the running of all statutes of limitations shall be suspended"—has no application to a suit by a bankruptcy trustee. We think 11 U. S. C. Section 29(e) is applicable to railroad reorganization proceedings and carries the only suspension of statutes of limitation running against claims belonging to the debtor's estate.

5. The New York Civil Practice Act, Section 48(5) provides a six-year period of limitations as to actions for fraud, a period which begins to run only from the discovery of the fraud. Plaintiffs, however, do not allege Alton was a victim of the kind of fraud covered by that section as construed in the New York decisions. See *Austrian* v. *Williams, supra; Laird* v. *United Shipyards, supra,* and New York decisions there cited.[8]

Affirmed.

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[8] Even if that statute applied to the fraud here alleged, nevertheless the action would fail. For the discovery—of whatever fraud had been practiced by B & O—occurred on November 25, 1942, the date of the appointment of Alton's bankruptcy trustee.

FILED
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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

October Term, 1955

No. 705

NORVIN RIESER, MILTON S. KOBLITZ, GEORGE S. CHAMPLIN, E. M. DART MFG. CO., LILLIAN BOEHM, BERNARD FEIN, KATHRYN P. BRAITHWAITE and EDWARD F. QUIRKE,

Petitioners,

and

EMANUEL JOSEPHSON, RUBIN SLAVSKY, RAYMOND WILEY and WILLIAM W. LANGE,

Intervening Petitioners,

against

THE BALTIMORE & OHIO RAILROAD COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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March 19, 1956

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IN THE

Supreme Court of the United States

October Term, 1955

NORVIN RIESER, MILTON S. KOBLITZ, GEORGE S. CHAMPLIN, E. M. DART MFG. CO., LILLIAN BOEHM, BERNARD FEIN, KATHRYN P. BRAITHWAITE and EDWARD F. QUIRKE, *Petitioners,* and EMANUEL JOSEPHSON, RUBIN SLAVSKY, RAYMOND WILEY and WILLIAM W. LANGE, *Intervening Petitioners,* *against* THE BALTIMORE & OHIO RAILROAD COMPANY, *Respondent.*	No. 705

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the court of appeals (App. 1a-6a)[1] is reported at 228 F.2d 563. The opinion of the district court (R. 23-41) is reported at 123 F. Supp. 44.

[1]References marked "App." are to the Appendix of this brief; those marked "R.", to the record.

Jurisdiction

The judgment of the court of appeals (App. 7a-8a) was entered December 2, 1955. The petition for certiorari was filed February 18, 1956. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254 (1).

Question Presented

Whether under the law of New York those torts of mismanagement allegedly committed by respondent against the Alton Railroad Company, would give petitioners, creditors of Alton, an independent cause of action against respondent, not barred by statutes of limitations at the time this action was commenced.

Statement

This litigation consolidates three actions brought by petitioners against respondent in federal court[2], jurisdiction being alleged on the ground of diversity of citizenship (Comp. par. 1; R. 3-4). The first of the three consolidated actions was commenced May 7, 1952.

Petitioners sue in a representative capacity as bondholders of the Alton Railroad Company [Alton] (Comp. par. 3; R. 4), and charge that from January 7, 1931 through November 25, 1942, while all the voting stock of Alton was owned by respondent, it so mismanaged the affairs of Alton as to cause that railroad to become insolvent.

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[2]The United States District Court for the Southern District of New York, which court ordered consolidation of the actions and directed service of a consolidated and amended complaint [complaint] (R. 1-2, 3-14).

Petitioners' charge of mismanagement of the Alton by respondent (Comp. par. 8; R. 5-8), consists of allegations that respondent, during its period of control, diverted traffic from Alton's lines to its own lines; failed to keep Alton's rolling stock in repair; used Alton's tracks, equipment and facilities without paying for such use; diverted purchases of equipment and supplies for Alton from its shippers to respondent's shippers; caused Alton to negotiate unprofitable contracts with the Pullman Company and others; utilized Alton's losses to offset its own profits for tax purposes during the years in which such losses occurred, thereby depriving Alton of an offset against profits later made in its own operations; and discriminated against Alton in dividing revenues on traffic interchanged between them. Those acts, it is claimed, caused damage to Alton in the amount of some $40,000,000 to $50,000,000 and prevented Alton from operating at a profit during the period in question (Comp. pars. 8, 9; R. 6-9).

Petitioners also aver that approval was given November 25, 1942, to a petition of Alton for reorganization under Section 77 of the Bankruptcy Act (Comp. pars. 11-12; R. 9). With that order of approval, control of the Alton by respondent ceased (Comp. par. 12; R. 9-10). During the pendency of the reorganization, application was made to the reorganization court for an order directing the trustee to prosecute those claims against respondent that petitioners now set forth in their complaint; the request was denied (Comp. par. 14; R. 10-11). The reorganization ended May 31, 1947 (Comp. par. 15; R. 11). Although petitioners' claims as bondholders were allowed in full in the reorganization proceeding, the assets of Alton proved insufficient to satisfy them, except to the extent of 37½¢ on the dollar (Comp. par. 16; R. 12).

The first count of the complaint asks damages for the alleged mismanagement of Alton by respondent (Comp. par. 19; R. 13). The second count urges that the alleged mismanagement constituted a fraud upon Alton and its creditors and that petitioners did not discover that fraud until long after November 25, 1942 (Comp. pars. 22, 23; R. 13). Judgment is asked in the amount of at least $28,343,750 (the claimed amount of the deficiency on Alton's bonds) to be distributed, after deducting petitioners' expenses, among Alton's bondholders (Comp. *ad damnum* clauses (b) and (c); R. 13).

Respondent moved the district court for summary judgment, under FED. R. CIV. P. 56(b), on the ground that the claim made in the complaint is barred in its entirety by the New York 3-year statute of limitations [C. P. A. §§ 48(8) and 49(7)] as a claim for corporate waste and/or by the New York 6-year statute of limitations [C. P. A. §§ 47-a and 48(1)] as a claim on a contract obligation. In the alternative, respondent asked for judgment dismissing petitioners' claim in so far as it arose out of events taking place more than 10 years prior to the commencement of the action [May 7, 1952] as barred, in any event, by the New York 10-year statute of limitations applying generally to equity cases [C. P. A. § 53] (R. 21-22).

The district court granted respondent's motion under the 10-year statute (R. 23-41) and entered final judgment dismissing the complaint to the extent that the claims therein arose out of events prior to May 7, 1942 (R. 50-51).

On December 2, 1955, the court of appeals affirmed the judgment of the district court (R. 60-61). In translating the acts alleged in the complaint into a substantive claim under New York law, the court of appeals determined

that claim to be an ancillary one in which petitioners are attempting to levy on an asset of Alton, in the form of a claim against respondent, solely in aid of petitioners' unsatisfied claims against Alton on their bonds (App. 2a-3a). This had also been the conclusion of the district court (R. 24).

The decision of the court of appeals, in one respect, however, goes further than that of the district court. The court below has held that petitioners' claim is governed not by the New York 10-year statute of limitations [C. P. A. § 53] but by either the New York 3-year statute [C. P. A. § 49(7)], respecting actions to recover damages for injury to property, or the New York 6-year statute [C. P. A. § 48(1) or (8)], respecting actions on contracts or judgments; that both such limitations commenced running from the time of appointment of the trustee in the bankruptcy proceeding; and that petitioners' action, having been commenced more than 6 years after the appointment of the trustee, must, therefore, be barred in full (App. 5a).

ARGUMENT

The decision of the court of appeals holds (a) that the alleged acts of respondent, which underlie the claim of petitioners, were harms done directly to Alton and only indirectly to petitioners, Alton's bondholders; (b) that the claim of petitioners is ancillary, therefore, to Alton's claim; and (c) that the privilege of petitioners to assert that ancillary claim against respondent is subject to and barred by the same statutes of limitations that controlled the claim as it lay in the hands of Alton.

Petitioners cite neither reason, case nor statute to contradict the first proposition and, although they make lavish

reference to New York statutes of limitations, they nonetheless allow, in respect of the third proposition that

> ". . . If, as the Court of Appeals held, this action is derivative, the cause of action was outlawed long before this action was commenced. . . ." (Pet. 15)

The nub of the case is, therefore, the second proposition, *viz.*, whether, under New York law,

> ". . . . this creditors' suit is not derivative but is direct. . . ." (Pet 16)

1. Throughout this litigation, petitioners have confused their right of suit—the right given them to maintain a creditors' bill—with the underlying claim of their debtor upon which they purport to levy in such suit. A creditor's right to *recover* in an ancillary proceeding (as distinguished from his right to *maintain* such a proceeding) necessarily presupposes the existence, at the time when the creditors' bill is filed, of an enforceable claim in behalf of the debtor. If no such claim exists, there is not anything upon which the creditors' bill may act.

Petitioners concede that the substantive cause which they assert is not one original with them. As they admit, it inhered long ago in their debtor for harms done that debtor. It exists, therefore, and has vitality now only because and to the extent that it existed in behalf of their debtor and became an asset of their debtor's estate. Petitioners' own interest comes into being solely because a remedy is claimed by them in their capacity as creditors, in aid of their independent claim against Alton in the form of this creditors' bill to levy upon that asset.

Since the cause of action sued upon is one which has devolved upon the petitioners from the Alton, it necessar-

ily comes into their hands subject to whatever infirmities, including the effects of statutes of limitations, may inhere in it. It cannot have more vitality in their hands than it had as an original claim and, if barred by limitations as an original claim when suit was commenced, is not revived by reason of having become the subject of a levy by creditors.

Petitioners seek to avoid all this by contending that, under New York law, statutes of limitations commence to run again whenever a debtor's chose of action devolves to the hands of levying creditors (Pet. 13-14). Needless to say, this thesis is uniformly contradicted by the New York statutes of limitations. Those dealing with real actions expressly state, in every case, that such actions are barred if the plaintiff *or his predecessor in interest* did not commence suit within the statutory period. See, *e. g.*, C. P. A. §§ 31, 33, 34, 37. With respect to personal actions, the New York statutes invariably provide, and almost uniformly state, that the period runs from the time of *accrual* of the cause of action. See *e.g.*, C. P. A. §§ 47, 47-a, 47-b, 48, 49, 50, 51, 53, 55. In the only instance where the rule is to the contrary [C. P. A. § 14, dealing with actions by a principal for the misconduct of his deputy or agent] the legislature explicitly stated that the normal rule should *not* be followed, and that a cause of action should be deemed to accrue only when the principal had been held liable for his agent's act. Compare C. P. A. § 48(5) dealing with actions for fraud and C. P. A. §§ 15(1), 49(4).

The general principle which underlies these statutes (that limitations shall apply to claims themselves and not change with a person becoming competent at one time or another to enforce them) was firmly established for

New York courts more than ninety years ago in *Bucklin* v. *Bucklin*, 1 Abb. App. Dec. 242. That principle is now too well ingrained in the law of New York to be questioned by a federal court, sitting under diversity jurisdiction as a state court. In the *Bucklin* case, the New York Court of Appeals held that a cause of action, arising in favor of a trust estate during the infancy of a beneficiary but not enforced by the trustee, would be barred in the hands of the beneficiary after her majority, despite her own incapacity to sue during earlier years. The court said (1 Abb. App. Dec. at p. 251):

> ". . . . If there are successive owners of the cause of action, or of equitable relief, and the right to prosecute arises in the time of the first, the period of limitation commences at that time, and continues attached to the demand during the several subsequent changes of both; and when the statute period has elapsed, the demand is barred, *though the last proprietor had recently acquired his right*. The statute refers to the time when the right to enforce the particular claim of relief accrued to the person who then possessed that right; otherwise the demand could be kept in force indefinitely by successive devolutions of title." [Emphasis added]

2. In an attempt to bring the judgment below within that compass of considerations which govern review on certiorari by this Court, petitioners urge that the court of appeals has decided an important state question in a way in conflict with applicable law (Pet. 2-3). But if, as they assert (Pet. 7), the legal pivot of this case be whether their claim is derivative or not, then they have failed to show how the judgment below conflicts with any statute or decision of New York.

To demonstrate this failure, we note, at the outset, petitioners' concession that

> ". . . . no statute is relevant to the point here under discussion." (Pet. 12; and see App. 2a)

Therefore, if the alleged conflict with applicable state law exists at all, it must arise by virtue of decisions of the New York courts. Looking to that only other source of possible conflict, we further note, as did the court below, with respect to the conclusion that petitioners' claim devolved to them from Alton, that

> ". . . . Significantly, plaintiffs cite no case holding otherwise, absent a statute." (App. 3a)

Certainly that failure of citation "to cases holding otherwise" is not repaired by the extended discussion (Pet. 9-14) that petitioners devote to two decisions of the New York Court of Appeals, those in the *Buttles*[3] and *Byllesby*[4] cases. Those cases, as was noted by the court below (App. 2a), are totally irrelevant here, because each

> ". . . . involved the application of the New York statute of limitations to claims based, substantively, on one or more New York statutes."

Thus, the *Buttles* case was an action brought by a receiver, as ancillary to sequestration proceedings on behalf of creditors of an insolvent corporation. The complaint stated three separate causes of action, each to set aside alleged fradulent diversions by defendants of the debtor's funds and for an accounting from defendants of property received by them from the debtor. The three separate causes were asserted under Section 15 of the New York

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[3]*Buttles* v. *Smith*, 281 N.Y. 226.
[4]*Hastings* v. *H. M. Byllesby and Co.*, 293 N. Y. 404.

Stock Corporation Law[5]; Section 274 of the New York Debtor and Creditor Law[6]; and Section 60(5) of the New York General Corporation Law.[7].

In the *Byllesby* case, a special trustee, appointed in a Section 77B bankruptcy proceeding, sued in the New York courts to recover from defendant, for the account of creditors, property of the debtor allegedly wasted or taken unlawfully from it, and to recover profits allegedly wrongfully appropriated. The causes of action asserted by the trustee were made under subdivisions 1 and 2 of Section 60 of the New York General Corporation Law[8].

But petitioners, as noted above, do not premise their claim upon any statute of New York. They contend that, not by force of statute, but under the common law of New York, the claim which they assert is independent, and not derivative. Clearly, that question cannot be decided by reference or exegesis upon cases in which the direct or ancillary character of the substantive rights asserted depends upon a statute.[9]

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[5]Prohibiting transfers in contemplation of insolvency and making a participating officer or director personally liable to creditors to the extent of their loss.

[6]Declaring transfers that make working capital inadequate for a specific business or transaction to be fraudulent as to persons becoming creditors during such business or transaction.

[7]Giving to creditors (see Section 61) a right of action against a director or officer of a corporation to set aside transfers made, with knowledge of the transferee, in violation of any law.

[8]Giving to creditors (see Section 61) a right of action against a director or officer of a corporation (1) to account for his official conduct, including management and disposition of the funds and property, committed to his care, and (2) to pay the corporation, or its creditors, any money and the value of any property which he may have disbursed, transferred, lost or wasted, in violation of duty.

[9]Note, however, with respect to the *Buttles* and *Byllesby* cases, that the court of appeals also observed (App. 2a, fn. 1):

> "Assuming, *arguendo*, that the *Byllesby* and *Buttles* cases were applicable, we think that the instant case is analogous to *Byllesby* rather than *Buttles*, and that the plaintiffs would therefore be barred under the rationale of the *Byllesby* case."

Since there is neither legislation nor decisional law in New York remotely suggesting that the claim which petitioners assert against respondent is not a derivative one, it follows that the court below did not decide that pivotal question or, as petitioners concede (Pet. 15), any question corollary to it, in a way in conflict with the applicable law of the State of New York.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 19, 1956

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 13, October Term, 1955

(Argued October 11, 12, 1955

Decided December 2, 1955.)

Docket No. 23560

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Before:

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LOUIS BOEHM AND NATHAN B. KOGAN (Victor House, Abraham K. Weber and Spencer Pinkham, of counsel) *for appellants.*

ABRAHAM K. WEBER *for Kathryn P. Braithwaite and Edward F. Quike.*

LOUIS H. O. FISCHMAN *for intervening appellants.*

CRAVATH, SWAINE & MOORE (Ralph L. McAfee, George M. Billings and Edward C. Perkins, of counsel) *for appellee.*

FRANK, *Circuit Judge:*

The facts are fully stated in Judge Murphy's opinion, 123 F. Supp. 44.

1. In their brief filed in this court, plaintiffs say that their suit is but "an old-fashioned creditors' bill" by "creditors of a corporate principal debtor against its sole stockholder for violation of its fiduciary duties as such stockholder," and that this suit, substantively, rests on no New York statute. Since, then, the basis of the plaintiffs' suit is non-statutory, we need not consider two cases, much discussed by the parties, *Buttles* v. *Smith,* 281 N. Y. 226, and *Hastings* v. *Byllesby,* 293 N. Y. 404, as both those cases involved the application of the New York statute of limitations to claims based, substantively, on one or more New York statutes.[1]

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available asset of his debtor. The asset may consist of a claim against a third person for a wrong that person did to the debtor. If that wrong be regarded as also done to the creditor, it is only an indirect wrong, and the creditor's suit is derivative, in effect.

However, plaintiffs contend that they suffered a direct and independent injury, apart from that done to Alton, and that a cause of action based on such injury accrued only after they had obtained a judgment with execution thereon returned unsatisfied.[14] The crucial question here is whether the alleged acts of B & O (a) constitute harms to Alton, and but indirectly to plaintiffs, Alton's bondholders, and/or (b) constitute harms done directly to those bondholders. Absent a statute, we think they clearly came within the first category.

Alton, for these harms, could have held B & O liable; and so could Alton's bankruptcy trustee, as Alton's successor.[15] Like the trustee, the plaintiffs stand in Alton's shoes; they have no shoes of their own. Significantly, plaintiffs cite no case holding otherwise, absent a statute.

True, while it remained under the domination of B & O, its sole stockholder, Alton, in practical terms, as virtually B & O's slave, could not have brought suit against B & O. But, under the New York statute of limitations as construed by the New York courts, the period of that domination did not suspend the running of the statute. See *Aus-*

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[14]We assume, *arguendo*, that conceivably there might be facts (other than those here) giving rise to such an independent cause of action, even in the absence of a statute, which the creditors could not pursue until they obtained a judgment and execution thereon was returned unsatisfied.

[15]Cf. *Henderson* v. *Binkley Coal Co.*, 74 F. (2d) 567 (C. A. 2); *Austrian* v. *Williams*, 198 F. (2d) 697 (C. A. 2).

trian v. *Williams*, 198 F. (2d) 697 (C. A. 2); *Laird* v. *United Shipyards*, 163 F. (2d) 12 (C. A. 2).[2]

3. Since plaintiffs do not allege any fraudulent conveyance, the New York Debtor and Creditor Law—which dispenses with a judgment in such circumstances—does not apply. Therefore a suit of this kind, and old-fashioned creditor's suit, could not be maintained until plaintiffs had the equivalent of a judgment against Alton and an unsatisfied execution. Plaintiffs maintain, and we shall assume, that they first occupied that position on May 31, 1947, when the Alton bankruptcy proceedings terminated.[3] The statute of limitations, Section 53 of the New York Civil Practice Act, applicable to such an equitable action, fixes a ten-year period within which suit must be brought; and this suit began on May 7, 1952, within that ten-year period.

These facts, however, do not help plaintiffs. We shall assume that, within the ten years ending May 31, 1957, plaintiffs, by their suit, could levy an equitable execution on any of Alton's available assets, which the final decree in the Alton bankruptcy proceedings permitted plaintiffs to pursue. But, to succeed, plaintiffs must show that those assets on which they seek thus to levy—*i.e.*, Alton's claims against B & O—were available when the suit began in 1952. They were not then available, because, before 1952, the statute of limitations had run with respect to those

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[2]This interpretation, out of line with the interpretation of similar statutes in many other jurisdictions, seems harsh and inequitable. But, of course, we must abide by what the New York courts say its statutes mean.

[3]That is, they obtained the equivalent of a judgment on the allowance of their bondholder claims in the Alton bankruptcy proceedings; and the termination of those proceedings on May 31, 1947, with part of the amounts due thereon unpaid, was the equivalent of a return of execution unsatisfied.

claims.[4] For the pertinent period of limitations is either (a) three years, under the New York Civil Practice Act, Section 49 subdivision 7,[5] or (b) six years, under Section 48 subdivisions (1) or (8).[6]

In short, making assumptions most generous to plaintiffs, suit on the claims against B & O were barred on November 25, 1948, *i.e.*, six years from the appointment of Alton's bankruptcy trustee on November 25, 1942.

4. To be sure, the trustee was discharged on May 31, 1947. We shall assume that—thanks to the provision of the final decree in the Alton bankruptcy proceedings which gave the bondholders the right to pursue the claims, if any, against B & O—plaintiffs succeeded to Alton's right to sue B & O which had never been availed of by Alton's trustee. If so, on the most generous assumptions, plaintiffs' suit would not have been barred until November 25, 1948. But plaintiffs did not start suit until 1952.

We cannot accept plaintiffs' contention that the statute commences to run anew when a claim passes to an assignee of, or a successor to, one who could have sued thereon. An assignment, whether or not by "operation of law," has no

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[4]Our reasoning here differs from that of the district judge. But, in affirming a judgment, of course we may do so for reasons other than those of the court below.

[5]Section 49 subdivision 7 includes "an action to recover damages for an injury to property. * * *"

[6]Section 48 subdivision 1 includes an action upon a contract, express or implied, except a judgment and other exceptions not here relevant.

Section 48 subdivision 8 includes derivative actions against present and former directors, officers and stockholders for an accounting, for fraud, or to recover penalites or forfeitures imposed by statute or common law, but specifically excludes actions for waste or injury to property or for an accounting in connection therewith. For these latter actions, reference is made to Section 49 subdivision 7.

such resurrective or phoenix-like potency.[7] Nor, since Alton's trustee in bankruptcy could have asserted these claims, did the pendency of the bankruptcy proceedings toll the statute, since 11 U. S. C. Section 205(b)—which provides that "the running of all statutes of limitations shall be suspended"—has no application to a suit by a bankruptcy trustee. We think 11 U. S. C. Section 29(e) is applicable to railroad reorganization proceedings and carries the only suspension of statutes of limitation running against claims belonging to the debtor's estate.

5. The New York Civil Practice Act, Section 48(5) provides a six-year period of limitations as to actions for fraud, a period which begins to run only from the discovery of the fraud. Plaintiffs, however, do not allege Alton was a victim of the kind of fraud covered by that section as construed in the New York decisions. See *Austrian* v. *Williams, supra; Laird* v. *United Shipyards, supra,* and New York decisions there cited.[8]

Affirmed.

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[7]*Bucklin* v. *Bucklin,* 1 Abb. Ct. App. Dec. 242, 251; *Cooley* v. *Lobdell,* 153 N. Y. 596, 602-603.

Section 14 of the New York Civil Practice Act makes a specific exception of an action by a principal against his agent, an exception not relevant here.

[8]Even if that statute applied to the fraud here alleged, nevertheless the action would fail. For the discovery—of whatever fraud had been practiced by B & O—occurred on November 25, 1942, the date of the appointment of Alton's bankruptcy trustee.

UNITED STATES COURT OF APPEALS

For the Second Circuit

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 2nd day of December one thousand nine hundred and fifty-five.

Present:

Hon. Jerome N. Frank,
Hon. Carroll C. Hincks,
Hon. Sterry R. Waterman,
Circuit Judges.

Norvin Rieser, *et al.*,
Plaintiffs-Appellants,

Emanuel Josephson, *et al.*,
Intervening Plaintiffs,

v.

The Baltimore and Ohio Railroad Co.,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

/s/ A. DANIEL FUSARO
Clerk

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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

October Term, 1955

No. 705

NORVIN RIESER, MILTON S. KOBLITZ, GEORGE S. CHAMPLIN, E. M. DART MFG. CO., LILLIAN BOEHM, BERNARD FEIN, KATHRYN P. BRAITHWAITE and EDWARD F. QUIRKE,
Petitioners,

and

EMANUEL JOSEPHSON, RUBIN SLAVSKY, RAYMOND WILEY and WILLIAM W. LANGE,
Intervening Petitioners,

against

THE BALTIMORE & OHIO RAILROAD COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

VICTOR HOUSE,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

Respondent's injection of the word "ancillary" neatly begs the question, but constitutes no argument. Petitioners' action is by definition ancillary to their own execution returned unsatisfied or its equivalent,—not to any claim of Alton. It is not, in any sense, "derivative", nor is Alton petitioners' "predecessor in interest".

The reasoning in the *Buttles* case does not depend on statute. Sections 60 and 61 of the General Corporation Law and Section 15 of the Stock Corporation Law merely declare and extend the common law. They in no wise abridge or diminish the general power of a Court of equity to aid an execution creditor. *Whalen et al.* v. *Strong*

et al., 230 App. Div. 617 (Fourth Dept., 1930); *Bailey* v. *Colleen Products Corporation et al.*, 120 Misc. 297 (1923); *McQueen* v. *New et al.*, 45 App. Div. 579 (First Dept., 1899). Cf. also *Stetson et al.* v. *Hopper et al.*, 60 App. Div. 277 (1st Dept., 1901).

Whether an action falls under the General Corporation Law (because it is against "officers and directors") or under the Stock Corporation Law (because it involves a "transfer") or is addressed to the general reserve power of equity, is immaterial to the distinction made in the *Buttles* and *Byllesby* cases between creditor suits, which are direct and do not arise until process returned unsatisfied, and other actions, which are derivative and may be maintained by the plaintiff without prior action against the principal debtor.

Dated: New York, March 23, 1956.

Respectfully submitted,

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